

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO**

In re POLYURETHANE FOAM ANTITRUST )  
LITIGATION )  
This document relates to: )  
ALL CASES )  
MDL Docket No. 2196  
Index No. 10-MD-2196 (JZ)

**DECLARATION OF ADAM B. WOLFSON**

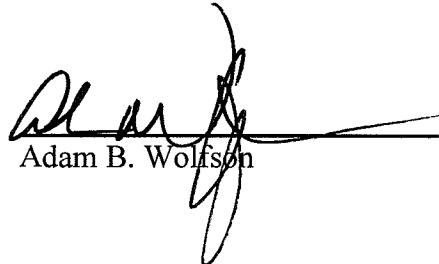
I, Adam B. Wolfson, under penalty of perjury, declare as follows:

1. I am an associate at Quinn Emanuel Urquhart & Sullivan, LLP, and I represent Direct Purchaser (Class Action) Plaintiffs ("Plaintiffs") in these consolidated actions. I submit this declaration in support of Direct Purchaser Class and Indirect Purchaser Class Plaintiffs' Opposition to Foamex Innovations, Inc.'s Sealed Motion for Reconsideration of the Court's July 19, 2011 Order (Docket No. 214).

2. Attached hereto as Exhibit A is a true and correct copy of relevant excerpts from the transcript of the July 1, 2011 hearing held before the Court on Defendants' respective motions to dismiss.

I declare under penalty of perjury that the foregoing is truthful and correct.

Executed on August 12, 2011.



Adam B. Wolfson

A handwritten signature in black ink, appearing to read "Adam B. Wolfson". Below the signature, the name "Adam B. Wolfson" is printed in a standard font.

# Exhibit A

1                   THE COURT: Good morning. Please be seated  
2 everyone. Welcome. We have lots to cover and I know  
3 people have planes and trains to catch, so I'll try to keep  
4 my remarks to a minimum and encourage you to do the same.  
5 You have an agenda that was handed out and I'd like to  
6 follow it. If there are other items you wish to discuss we  
7 certainly can do so and I'll leave it to you and your good  
8 discretion to raise it at the appropriate time. This  
9 first item is what I call a housekeeping matter, and I'd  
10 like to clarify and hopefully easily resolve any issues  
11 with respect to any party that is incorrectly named. Let's  
12 just straighten that up. The example I tossed out is  
13 carpenter entities and do we have a dispute here with  
14 respect to them are they collectively identified. Do you want  
15 to go ahead and address that Steve?

16                   MR. NEUWIRTH: Mr. Isaacson?

17                   MR. ISAACSON: Your Honor --

18                   THE COURT: This courtroom is not the best for  
19 acoustics so I want to make sure everybody can hear and  
20 there's a large crowd and some are behind you.

21                   MR. ISAACSON: We noted the discrepancy between  
22 how carpenter was listing one entity and how we have. We  
23 haven't had the opportunity to confer with them. When they  
24 tell us this is the correct entity name we'll have no  
25 problem putting that correct entity name in, and if any

1 Your Honor, and this is the HCR -- HCR I case. What Your  
2 Honor concluded in that case is simply that the defendant's  
3 own president and the defendant's own CEO were agents of  
4 that corporation. He didn't address whether the president  
5 or CEO of a parent corporation were agents of those  
6 corporations. The other cases are simply not applicable.  
7 They don't establish that a mere allegation that a  
8 president of a parent corporation merely, quote, acting for  
9 is enough to establish agency of that corporation. And  
10 thank you Your Honor. That's all I have to say.

11 THE COURT: Let's go onto question number eight  
12 please for both sides with respect to FXI. This will  
13 require merely a short answer. Give me your cite.

14 MR. NEUWIRTH: Thank you, Your Honor. And we  
15 have these collected behind tab 26 and 27. The first  
16 answer is as you know Your Honor.

17 THE COURT: I'm going to stop you, 26 and 27 is  
18 where I'll find the answer to that question?

19 MR. NEUWIRTH: Correct.

20 THE COURT: Thank you. Other side, give me a  
21 cite.

22 MR. RYAN: Tabs 26 and 27 -- good morning, Peter  
23 Ryan.

24 THE COURT: Thank you.

25 MR. RYAN: Tabs 26 and 27 the plaintiffs have

1 identified four paragraphs. I'm just note for Your Honor's  
2 consideration that they also attach an exhibit at the end  
3 where they have a long list of what they say are the  
4 allegations that relate to what they call Foam Ex. We said  
5 it's in our papers but I'll reiterate it one more time, FXI  
6 Foamex innovations Inc. is not Foamex international Inc.  
7 And plaintiffs ignore this in their complaints. They  
8 ignore it in their opposition brief. They ignored it in  
9 the binder that they have prepared today. I'm going to  
10 address the four paragraphs that they have specifically  
11 identified in this tab.

12 The first is paragraph 97 of the CAC, this  
13 paragraph does not allege anything about FXI that is  
14 suggestive of a conspiracy or an agreement to fix prices.  
15 This paragraph alleges that two other individuals, not at  
16 FXI, had a discussion in April of 2010 where one told the  
17 other that future Foamex and flexible intended to increase  
18 the price of foam by 20 percent in the next weeks. This is  
19 not an allegation that FXI agreed with anyone on the price  
20 of foam. It is market information where it came from is  
21 not in the paragraph. It could have come from customers or  
22 some other source. It is not an allegation that FXI made  
23 an agreement with anyone. And there is no suggestion in  
24 this paragraph that FXI has shared any information with  
25 anyone except its customers. We don't know where this

1 information came from. I would just call your attention to  
2 a paragraph that's not mentioned in the list four of the  
3 plaintiffs identify in the next paragraph paragraph 98  
4 because this illuminates or mud else the information in  
5 paragraph 97. The paragraph 98.

6 THE COURT: Which does it do.

7 MR. RYAN: It mud else it to be sure. In  
8 paragraph 98 the same individuals are having a conversation  
9 at a later date where and quote, in a CAC now it's looking  
10 it's all -- everything is postponed to May 31st or  
11 June 1st. There is a letter out from -- from 31st of May,  
12 this is a letter out for flexible for June 1st. Foamex  
13 sent a letter two weeks ago at 15 percent but it looks like  
14 now that the increase is going to be ten and 12 percent on  
15 the foam. This is not an allegation of an agreement by  
16 anyone. This is an indication of a lack of agreement.  
17 Paragraph 97 is apparently plaintiffs have identified  
18 suggests that they're all going at 20 percent. Then  
19 there's a letter in paragraph 98 from Foamex, a letter that  
20 was sent out doesn't say that Foamex sent it to any of the  
21 other defendants. It says that Foamex is going at 15  
22 percent, not 20 percent. But then paragraph 98 says that  
23 the actual increase is going to be ten to 12 percent so we  
24 have three different percentages here that is not evidence  
25 of an agreement by Foamex Innovations Inc. to fix prices

1 with anyone. The next paragraph that plaintiff's have  
2 identified is paragraph 101.

3 THE COURT: Before you go onto that, isn't that  
4 an example of why we need more of a record to determine  
5 whether the conduct that's been alleged in this example is  
6 perfectly innocent or part of the conspiracy?

7 MR. RYAN: Your Honor, before we get to the point  
8 where we can go into discovery, the plaintiffs have to  
9 allege that FXI actually participated or made an agreement  
10 to fix prices.

11 THE COURT: Oh, they've an edge willed that.  
12 They've alleged you're part of the agreement, part of the  
13 conspiracy and your part and parcel of the problem they may  
14 not have named a date or a month or a year, but they've  
15 named you as part of the group and cited as an example what  
16 you just quoted from. Isn't that enough to get you into  
17 the game, so to speak, at this juncture.

18 MR. RYAN: Your Honor, it is not. And I would  
19 refer you to sixth circuit's decision and your opinion  
20 Total Benefits planning and the quote in that case, and I  
21 point out here that there is no allegation putting to one  
22 side the facts that plaintiffs completely ignored the  
23 difference between the bankrupt company Foamex  
24 international Inc. and FXI, there is no allegation in the  
25 complaint anywhere that FXI ever joined the conspiracy or

1 took any affirmative act in support of this conspiracy and  
2 in Total Benefits the sixth circuit held nowhere did  
3 plaintiffs allege when defendants joined the conspiracy,  
4 where or how this was accomplished and by whom or for what  
5 purpose. Generic pleading alleging misconduct against  
6 defendants without specifics as to the role each played in  
7 the alleged conspiracy was specifically rejected by  
8 Twombly. In this circumstance, Your Honor, where the  
9 plaintiffs completely ignore the difference between two  
10 companies, just because they both have the name Foamex in  
11 them they assume they're the same, general allegations of  
12 conspiratorial discussion or in this paragraph of a letter  
13 that problems we have no idea where it came from untended  
14 any specific allegation or conduct by FXI is inadequate  
15 under Twombly and Total Benefits.

16 THE COURT: Are you representing FXI Foamex  
17 Innovations and -- I'm sorry, anybody else?

18 MR. RYAN: I just represent FXI.

19 THE COURT: That's what I thought. Thank you.

20 MR. RYAN: There are other paragraphs in the  
21 complaint that they've identified.

22 THE COURT: You have comments, would you. You  
23 have 60 seconds. That doesn't mean you get to talk fast.

24 MR. RYAN: The next paragraph 101 they've  
25 identified the CAC Your Honor and this is a paragraph where

1       they have cited a discussion again. This is between two  
2       people who have no connection to FXI where one person says  
3       we do the same thing with Foamex we don't go after their  
4       accounts and they've stayed away from our accounts too,  
5       this is not an allegation of any conspiracy to fix prices.

6                   THE COURT: Sounds like they're cutting up the  
7       market to me.

8                   MR. RYAN: Your Honor the Supreme Court addressed  
9       this very question in Twombly, and this quote Twombly 556  
10      existing competition is routine market conduct so natural  
11      in fact it's alleged parallel positions to exist  
12      competition. We're not going to apply to any \*\*\*justice  
13      pleading section one against any group of competing  
14      businesses would be a sure thing (check that ) this  
15      paragraph 101 does not allege that this person speaking,  
16      his company and FXI had an agreement not to go after each  
17      other. It just says that they don't go after each other  
18      and he provides a perfectly legitimate reason for why. And  
19      the quote he says this is a market -- this is a quote there  
20      ain't much business out there, unquote. It's perfectly  
21      legitimate conduct by two parties in a market where there  
22      ain't much business about out there if you go after is  
23      somebody else's customers you can be sure they're going to  
24      come after yourself. Twombly addressed this specificaly  
25      and in my last 10 seconds, the last two paragraphs, these

1 two paragraphs from the Canadian affidavit, one references  
2 what the CAC identifies as the current vice president of  
3 Vitafoam who spent 23 years in a different company and only  
4 arrived at Vitafoam in April of 2009.

5 The allegation in paragraph 83 of discussions,  
6 exchanges of information and agreements with a laundry list  
7 of all the defendants including FXI is not a specific  
8 allegation that FXI participated in anything, any kind of  
9 TKPWREPL or took any conduct that is subject to section  
10 one. The only specific allegation with regard to this  
11 individual the current vice president of Vitafoam are in  
12 the CAC at paragraphs 87 and paragraph 112 A, and both of  
13 those paragraphs, 87 and 112 A about this individual take  
14 place well before the asset purchase and bankruptcy. One  
15 of them was in the year 2000 and another one is only  
16 identified as while this person was employed at another  
17 company, and that other company he didn't even arrive at  
18 Vitafoam until before the bankruptcy.

19 So in the last paragraph is paragraph 84 Your  
20 Honor, this is completely non specific. It is a general  
21 legal conclusion, a legal allegation about the Canadian  
22 law, and I just want to point out one final thing, the  
23 Canadian affidavit does the same thing that the CAC does.  
24 It makes no distinction whatsoever between FXI and Foamex  
25 international Inc. it identifies allegations throughout the

1 affidavit and makes no distinction between the company that  
2 existed before the bankruptcy and the company that  
3 purchased assets it bankruptcy section 363.

4 THE COURT: You're ready to toss FXI?

5 MR. NEUWIRTH: In your honor. Paragraph 23 of  
6 the complaint names FXI as a defendant. It points out that  
7 FXI used to do business -- used to be called Foamex, it  
8 uses the term Foamex as the difficult vine term for FXI and  
9 part of the reason for that is because FXI bought Foamex  
10 out of bankruptcy in June 2009. One of the things that  
11 acquired was the Foamex name and it continues to do  
12 business as Foamex even though the technical corporate  
13 owner is FXI. We would respectfully submit that the  
14 paragraphs in the complaint that we've cited at tabs 26 and  
15 27 are way beyond the line of what Twombly and Iqbal  
16 required. Your Honor correctly pointed out that the  
17 paragraph 101 refers to a conversation in which a vice  
18 president of Vitafoam says that we do the same thing with  
19 Foamex, we don't go after each other's accounts. In the  
20 context of what's been alleged, that is way beyond the line  
21 from speculative to plausible. Tab 27 paragraph 84 the  
22 declaration from Canada is a declaration from an official  
23 of the Canadian competition bureau, and he says previous  
24 and ongoing conduct. This is a July 21st 2010 affidavit, a  
25 year after FXI bought the company called Foamex, a year

1 each time you engage in the conspiratorial conduct. So  
2 whether it is by virtue of newly joining the conspiracy and  
3 engaging in these new acts or whether it is by virtue of  
4 joining the conspiracy and becoming jointly and severally  
5 liable for all the conduct of the conspiracy, we believe  
6 that we've done more than enough to allege FXI's  
7 participation in the conspiracy, and let's not forget the  
8 same people are still at FXI that were at Foamex, the same  
9 people are engaged in the conduct. All that changed was  
10 the ownership and FXI is the entity that is referred to as  
11 Foamex in the business community in the Canadian affidavit  
12 and in our complaint. Thank you.

13 THE COURT: And therefore the bankruptcy order  
14 cannot serve as a broom to sweep out.

15 MR. RYAN: I respectfully disagree, Your Honor.  
16 Mr. Neuwirth was just saying precisely what itches talking  
17 about. He talks about FXI continuing after the bankruptcy  
18 with its conduct. FXI is not Foamex international Inc. We  
19 will get in a moment when we get to the question about  
20 successful liability.

21 THE COURT: If we ever get there.

22 MR. RYAN: If we ever get there to this.

23 THE COURT: Actually we're there right now  
24 because I posed the question but go ahead. Work your  
25 answer into what you want and again you've got 60 seconds.

1                   MR. RYAN: The allegations that Mr. Neuwirth  
2 identified about previous and ongoing conduct by a laundry  
3 list in the Canadian affidavit of every single entity named  
4 in that affidavit is not a specific allegation as to any  
5 particular time period about FXI. And in this  
6 circumstance, given the fact of bankruptcy and given the  
7 successor liability issues that are at issue here and the  
8 fact that the paragraphs the plaintiffs have identified  
9 after the bankruptcy are wholly inadequate under Twombly.  
10 It is very important to realize that Canadian affidavit  
11 doesn't realize anything in particular or anything specific  
12 about my client.

13                  THE COURT: Let's skip over number ten. Let's go  
14 onto number 11 and the Woodbridge emphasis.

15                  MR. NEUWIRTH: Thank you, Your Honor.

16                  THE COURT: Do we have some agreement as to  
17 Woodbridge here which Woodbridge is in and Woodbridge is  
18 out? I challenge you to say that three times fast.

19                  MR. NEUWIRTH: Let me try to answer that in the  
20 following way, we understand that the defendants made an  
21 argument about our purportedly only focusing on the so  
22 called Woodbridge group. I believe that is a misstatement  
23 in the complaint because Woodbridge group is not named as a  
24 defendant and the and allegation about Woodbridge group  
25 comes in paragraph 46 where it says that Woodbridge group,